Supreme Court, U.S.
FILED
FEB 26 1992
OFFICE OF THE CLERK

No. 91-1230

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HOUSTON LIGHTING AND POWER COMPANY,
Petitioner,

v.

THE HONORABLE JOSEPH B. MORRIS, JUDGE
(City of San Antonio and Central Power and Light Company, Real Parties in Interest)
Respondents.

CENTRAL POWER AND LIGHT COMPANY'S BRIEF IN OPPOSITION TO HOUSTON LIGHTING AND POWER COMPANY'S PETITION FOR WRIT OF CERTIORARI

FERD. C. MEYER, JR.
KENNETH C. RANEY, JR.
CENTRAL AND SOUTH WEST CORPORATION
1616 Woodall Rodgers Fwy.
Box 660164
Dallas, Texas 75202

ORRIN L. HARRISON, III*
THOMAS S. LEATHERBURY
WILLIAM H. CHURCH, JR.
LOCKE PURNELL RAIN HARRELL
(A Professional Corporation)
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776
(214) 740-8000
(214) 740-8800 (FAX)

Attorneys for Central Power and Light Company

**Counsel of Record*

February 26, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	2
REASONS FOR DENYING HL&P'S PETITION	3
I. This Court lacks jurisdiction to review Judge Morris's interlocutory order	3
A. Under federal law, decisions compelling arbitration are not "final judgments"	4
B. The Texas Supreme Court has not rendered a "final judgment"	5
II. Alternatively, this Court should exercise its discretion to deny HL&P's Petition	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
Baltimore Contractors, Inc. v. Bodinger,348 U.S. 176 (1955)	4
Bethke v. Polyco, Inc., 730 S.W.2d 431 (Tex. App.—Dallas 1987, n.w.h.)	6
Catlin v. United States, 324 U.S. 299 (1945)	7
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (Rehnquist, J., dissenting)	4
Davies v. Corbin, 112 U.S. 36 (1884)	5
Detroit & Mackinac Railway Co. v. Michigan Railroad Commission, 240 U.S. 564 (1916)	5
Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988)	7,8
In re Tiffany, 252 U.S. 32 (1920)	4
Jolley v. Paine Webber Jackson & Curtis, Inc., 864 F.2d 402 (5th Cir. 1989)	4,8
Mathews v. Eldridge, 424 U.S. 319 (1976)	4
McMullen v. Yates, 697 S.W.2d 500 (Tex. App.—San Antonio 1985, orig. proceeding)	6
Mishkin v. New York, 383 U.S. 502 (1966)	10
New York v. Uplinger, 467 U.S. 246 (1984) (Stevens, J., concurring)	9
Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947)	2,9,10
Schoenamsgruber v. Hamburg American Line, 294 U.S. 454 (1935)	4
Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449 (1935)	4
Shearson Lehman Hutton, Inc. v. McKay, 763 S.W.2d 934 (Tex. App.—San Antonio 1989, orig. proceeding)	6,7

Table of Authorities Continued

	Page
RULES AND STATUTES:	
9 U.S.C. § 16	6
28 U.S.C. § 1257	3,4
28 U.S.C. § 1291	4
Tex. Rev. Civ. Stat. Ann. art. 238-2 (Vernon 1973)	6
United States Supreme Court Rule 10.1	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HOUSTON LIGHTING AND POWER COMPANY,
Petitioner,

v.

THE HONORABLE JOSEPH B. MORRIS, JUDGE
(City of San Antonio and Central Power and Light Company, Real Parties in Interest)
Respondents.

CENTRAL POWER AND LIGHT COMPANY'S BRIEF IN OPPOSITION TO HOUSTON LIGHTING AND POWER COMPANY'S PETITION FOR WRIT OF CERTIORARI

Respondent Central Power and Light Company ("CPL") respectfully prays that the Court deny Petitioner Houston Lighting and Power Company's ("HL&P") Petition for Writ of Certiorari. The decision HL&P complains of is an interlocutory order of a Texas district court judge compelling arbitration of a dispute between HL&P and the City of San Antonio, acting by and through City Public Service Board of San Antonio, ("San Antonio") and CPL. The Dallas Court of Appeals and the Texas Supreme Court both refused to review the district court's interlocutory order. Under Texas law, both courts lacked jurisdiction to grant the relief sought by HL&P. Neither Judge Morris' decision to compel arbitration nor the decisions of the Dallas Court of Appeals and the Texas Supreme Court are final judgments within this Court's

jurisdiction. Until there is a complete record, until the arbitration has been conducted and until the Texas courts of appeal have addressed the issues raised by HL&P, this dispute is not ripe for review by the United States Supreme Court.

STATEMENT OF THE CASE

The Statement of the Case submitted by HL&P does not accurately recount the procedural history of this dispute and mischaracterizes the factual record before the Texas district court judge when he ruled. The brief in opposition submitted by San Antonio points out in sufficient detail the defects in HL&P's Statement of the Case, and CPL will rely on and incorporate San Antonio's Statement of the Case rather than duplicate San Antonio's efforts. CPL suggests to the Court, however, that the parties' disagreement as to the factual record and procedural history indicate the importance of allowing the Texas district court to enter a final, appealable order and allowing the Dallas Court of Appeals and the Texas Supreme Court to review the issues raised by HL&P with a complete record before them. The limitations of the record make it inappropriate for the Court to rule at this time. *See Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 575 (1947).

SUMMARY OF THE ARGUMENT

The United States Supreme Court lacks jurisdiction to review this interlocutory state court order compelling arbitration. The Court must examine the effect rather than the form of the decisions complained of to determine their finality. The effect of the decisions complained of by HL&P is to allow a dispute to pro-

ceed to arbitration. Under federal and state law, it is clear that decisions compelling arbitration are not final judgments. Moreover, under state law, the Texas courts of appeal were without jurisdiction to consider HL&P's complaints and could not render any decision, final or otherwise, on the issues raised by HL&P. The absence of a final judgment deprives this Court of jurisdiction to accept HL&P's Petition for Writ of Certiorari; and, the interlocutory status of this case, with all of its unresolved questions, indicates that, even if jurisdiction existed, this Court should exercise its discretion to deny HL&P's petition.

REASONS FOR DENYING HL&P'S PETITION

I. This Court lacks jurisdiction to review Judge Morris's interlocutory order.

The United States Supreme Court has jurisdiction over a case from a state court only if a final judgment has been rendered by the state's highest court. 28 U.S.C. § 1257. The order HL&P seeks to have the United States Supreme Court review is an interlocutory decision of a state district court judge to stay litigation and to compel arbitration. Under federal law, decisions which result in stays of litigation pending arbitration are clearly not "final judgments" reviewable by the Supreme Court. Similarly, under Texas law, decisions staying litigation and compelling arbitration are not reviewable by appeal or by mandamus. The Dallas Court of Appeals and the Texas Supreme Court lacked jurisdiction to consider the issues raised by HL&P at the time HL&P attempted to raise them, and the Texas appellate courts properly refused to issue any decision based on HL&P's arguments. This Court's jurisdiction has not been prop-

erly invoked; there has been no "final judgment" by any Texas court.

A. Under federal law, decisions compelling arbitration are not "final judgments".

This Court has consistently ruled that decisions staying litigation and compelling arbitration are not "final judgments". *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 179 (1955); *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454, 456 (1935); *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449, 451 (1935). The United States Court of Appeals for the Fifth Circuit has recently reemphasized the clarity of this Court's prior decisions holding that decisions compelling arbitration are interlocutory and not final decisions appealable under 28 U.S.C. § 1291. *Jolley v. Paine Webber Jackson & Curtis, Inc.*, 864 F.2d 402, 405 (5th Cir. 1989). As this Court is well aware, the scope of "final judgments" which this Court can review under 28 U.S.C. § 1257 is at least as narrow, if not more narrow, than the scope of "final decisions" reviewable by federal appellate courts under 28 U.S.C. § 1291. *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976);*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 502-03 (1975) (Rehnquist, J., dissenting); *In re Tiffany*, 252 U.S. 32, 36 (1920). If decisions compelling arbitration are not sufficiently final for review under 28 U.S.C. § 1291, then such decisions are also not reviewable by this Court under 28 U.S.C. § 1257. The Court should deny HL&P's attempt to obtain certiorari review of an interlocutory state district court decision for lack of jurisdiction.

B. The Texas Supreme Court has not rendered a "final judgment".

Contrary to HL&P's argument, the Texas Supreme Court has not taken any action which would qualify as a final judgment. In both the Dallas Court of Appeals and the Texas Supreme Court, HL&P filed motions for leave to file a petition for writ of mandamus. Neither the Dallas Court of Appeals nor the Texas Supreme Court issued any decision on HL&P's petitions for writ of mandamus. Instead, both courts implicitly recognized that they lacked jurisdiction to consider HL&P's premature request for review. Both courts expressly declined to consider the merits of HL&P's position and denied HL&P's motion for leave. The denial of a motion for leave to file a petition for writ of mandamus is hardly a final judgment. The denial of the motion for leave clearly anticipates further litigation and the development of a complete record for the possibility of a later, timely appeal.

This Court's precedent makes it clear that the Texas Supreme Court's decision to deny HL&P's motion for leave to file a premature appellate proceeding is not a final judgment. The limited mandamus actions which this Court has previously deemed final judgments have involved decisions by the highest state court on the merits of the issues raised by the petition for writ of mandamus. *See Detroit & Mackinac Railway Co. v. Michigan Railroad Commission*, 240 U.S. 564, 570-71 (1916); *Davies v. Corbin*, 112 U.S. 36, 40 (1884). The Court's seminal case concerning the issue of when a mandamus proceeding is a final judgment discusses the importance of a decision on the merits by the lower court. *Davies v. Corbin*, 112 U.S. at 40. It is the decision on the merits that renders a mandamus

proceeding final. *Id.* It follows that there can be no final judgment when a court refuses to consider the merits. Certainly, a court does not render a final judgment when it denies a motion for leave to file a petition for writ of mandamus because the court lacks jurisdiction to grant the motion. This is such a case.

The Federal Arbitration Act expressly prohibits interlocutory appeals of decisions staying litigation and compelling arbitration. 9 U.S.C. § 16. The Texas Arbitration Act likewise prohibits parties from pursuing interlocutory appeals of decisions compelling arbitration. Tex. Rev. Civ. Stat. Ann. art. 238-2 (Vernon 1973); *Bethke v. Polyco, Inc.*, 730 S.W.2d 431, 434 (Tex. App.—Dallas 1987, n.w.h.). Texas courts have uniformly recognized the wisdom of the Texas legislature's policy choice, and have expressly held that decisions compelling arbitration cannot be reviewed by petition for writ of mandamus:

> If we assume, while not deciding, that the court incorrectly compelled arbitration, the resulting delay is no more onerous than being forced to try a case in an inappropriate venue, or suffering an incorrect ruling on a plea to the jurisdiction, a plea in abatement, or any other interlocutory order that is not subject to correction by mandamus.

McMullen v. Yates, 697 S.W.2d 500, 502 (Tex. App.—San Antonio 1985, orig. proceeding). Under Texas law, interlocutory review by mandamus to the Texas court of appeals and Texas Supreme Court is not available "because relator has an appeal available once a final judgment is entered and he loses no contract rights or benefits by availing himself of arbitration."

Shearson Lehman Hutton, Inc. v. McKay, 763 S.W.2d 934, 938-39 (Tex. App.—San Antonio 1989, orig. proceeding).

Under Texas procedural law, the decision of the state district court of which HL&P complains is not reviewable by either appeal or by mandamus. In adhering to Texas law, the Dallas Court of Appeals and the Texas Supreme Court both declined to review Judge Morris's interlocutory decision. The Dallas Court of Appeals and the Texas Supreme Court did not refuse to grant the relief HL&P requested, instead both courts recognized that HL&P's request for review was premature and that the appellate courts lacked jurisdiction. The only action taken by the Dallas Court of Appeals was the issuance of an order denying HL&P's motion for leave to file a petition for writ of mandamus. The Texas Supreme Court likewise only refused HL&P's motion for leave. Neither action is a final judgment; both courts may fully consider the issues raised by HL&P on a timely appeal. Neither court considered the merits of HL&P's arguments; their actions merely indicate that HL&P's request for review is premature.

In addition, the Court must give more weight to the substance and effect of the Texas Supreme Court's action than the form in which HL&P attempted to disguise its interlocutory appeal. The Court's decisions consistently recognize that a decision is final only when the decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 299, 233 (1945). A decision is not final if the decision ensures further action by the lower courts. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271,

275 (1988). A decision which has the effect of allowing an arbitration to proceed is simply not a final judgment. *Jolley v. Paine Webber Jackson & Curtis, Inc.*, 864 F.2d at 405. "While an order granting a stay postpones active litigation in the district court, it contemplates that the district court will retain jurisdiction to confirm, modify, or in some cases, to renew the litigation despite the arbitration award." *Id.* The effect of the Texas Supreme Court's decision to deny HL&P's motion was to allow the dispute to continue towards resolution, not to render any final decision in the dispute.

This Court lacks jurisdiction to review the actions of a Texas district court judge until Texas's highest court of appeal reviews his decision. The Texas Supreme Court has deferred review by denying HL&P's motion for leave to file a petition for writ of mandamus. The Texas Supreme Court could not have rendered a final decision when the court did not even have jurisdiction to consider the questions presented. This Court lacks jurisdiction to consider HL&P's premature petition for writ of certiorari.

II. Alternatively, this Court should exercise its discretion to deny HL&P's Petition.

"A review on writ of certiorari is not a matter of right, but of judicial discretion." United States Supreme Court Rule 10.1. While Rule 10 does not limit the Supreme Court's discretion, it does indicate when the Court's discretion should be exercised in favor of granting review. All of the examples given in Rule 10 concern decisions by other courts of appeal. As noted in the preceding section, there has been no decision by either the Dallas Court of Appeals or the Texas Supreme Court. These courts found HL&P's

request for review premature and that they lacked jurisdiction to review the issues raised by HL&P. Under Texas law, these courts cannot and will not consider the issues raised by HL&P until after a final judgment is entered by the state district court judge. This Court's prior decisions indicate that the Court should deny HL&P's Petition for Writ of Certiorari and allow the Texas courts of appeal to consider these issues when they are ripe for review. If, after the Texas courts of appeal have ruled, HL&P is still dissatisfied, HL&P will not be barred from seeking review from this Court.

The United States Supreme Court has consistently adhered to its self-named "policy of strict necessity" in disposing of constitutional issues. *New York v. Uplinger*, 467 U.S. 246, 251(1984) (Stevens, J., concurring); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568 (1947). Among the most significant factors analyzed by the Court in past decisions concerning the strict necessity for action has been the prematurity of the petitioner. "Fundamental principles of constitutional adjudication counsel against premature consideration of constitutional questions and demand that such questions be presented in a context conducive to the most searching analysis possible." *New York v. Uplinger*, 467 U.S. at 251 (Stevens, J., concurring). The Court has repeatedly declined review when actions by lower appellate courts could obviate the need for action by the Court. "[J]urisdiction here should only be exerted when the jurisdictional question presented by the proceeding in prohibition tenders the underlying constitutional issues in clean-cut and concrete form, unclouded by any serious problem of construction relating either to the

terms of the questioned legislation or to its interpretation by the state courts." *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. at 584.

This case is not properly before the Court. The lower courts of appeal did not rule against HL&P or affirm Judge Morris. The lower courts of appeal merely refused HL&P's invitation to make a premature ruling on the incomplete record presented by an extraordinary, interlocutory appellate proceeding. The wisdom of the appellate courts' abstention is clear. HL&P's concerns can be addressed in a variety of ways before a final judgment is entered: the challenged arbitrators may recuse themselves if asked to do so by HL&P; the challenged arbitrators may rule in HL&P's favor; the challenged arbitrators may, by their actions, convince HL&P of their neutrality; the state district court may vacate any tainted award and order an appropriate remedy; the Dallas Court of Appeals may resolve HL&P's concerns if and when it reviews Judge Morris's final order; and, the Texas Supreme Court may settle the issues after reviewing a full record and a final order. Precedent dictates that the Court should await all of these possibilities. "[The] questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision." *Mishkin v. New York*, 383 U.S. 502, 512-13 (1966). The policy of strict necessity suggests that this case is not ripe for review at this level. The Court should deny HL&P's Petition for Writ of Certiorari.

CONCLUSION

Central Power and Light Company respectfully prays that the Court deny Houston Lighting and

Power Company's Petition for Writ of Certiorari. HL&P has delayed this arbitration for four years since CPL and San Antonio first called for arbitration in March of 1988. Because HL&P has successfully delayed arbitration, there is no final judgment for the Court to review, and jurisdiction is lacking. On both a jurisdictional and a discretionary basis, the Court should conclude that this case is not ripe for review and should deny HL&P's Petition for Writ of Certiorari.

Respectfully submitted,

FERD. C. MEYER, JR.
KENNETH C. RANEY, JR.
CENTRAL AND SOUTH WEST CORPORATION
1616 Woodall Rodgers Fwy.
Box 660164
Dallas, Texas 75202

ORRIN L. HARRISON, III*
THOMAS S. LEATHERBURY
WILLIAM H. CHURCH, JR.
LOCKE PURNELL RAIN HARRELL
(A Professional Corporation)
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776
(214) 740-8000
(214) 740-8800 (FAX)

Attorneys for Central Power and Light Company

Counsel of Record

February 26, 1992